

*United States Court of Appeals
for the Second Circuit*



**RESPONDENT'S
BRIEF**

75 - 4145

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4145

WNCN LISTENERS' GUILD,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

STARR WQIV, INC.,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

THE ISSUE PRESENTED

Whether the Commission properly held that Starr was reasonable in its determination that the announcements broadcast did not address the merits of whether WNCN's format should be changed.

COUNTERSTATEMENT

1. The Complaint and Responsive Pleadings

This case arises from a fairness complaint filed September 23, 1974, by the WNCN Listeners' Guild (Guild), as part of its attempt to prevent Starr Broadcasting from changing the format of radio station WNCN from one which plays only classical music. (A. 10-14.) The fairness complaint was severed from the challenge to the format change and referred to the Complaints and Compliance Division of the Commission's Broadcast Bureau, which handles all fairness doctrine matters.

(A. 112.)

The complaint alleged that announcements made by William F. Buckley, Jr., Starr's Chairman, and station personnel had presented only one side of a controversial issue of public importance, i.e., the format change. Although the complaint did not specify the controversial issue which it believed the announcements addressed, it included as an exhibit (A. 23-24) a letter to WNCN which specified the issue. The letter stated that

These announcements present only one side of the issue, i.e., that the classical music format is not economically viable for a commercial station and that the only way to retain the unique programming which WNCN has previously employed is through the means of a listener-sponsored station.

(A. 5; A. 23.)

The Guild suggested that because some of the announcements were logged as editorials, those announcements addressed one side of a controversial issue of public importance. (A. 11.) The Guild went on to state that whether or not the announcements were presented in good faith, their effect was to benefit financially Starr's stockholders. (A. 11.) The Guild charged that Starr was attempting to mislead its listeners (A. 12), implying but not claiming that Starr's announcements were presented in bad faith. Because the station had editorialized "in its own behalf," the station owed a special duty to present opposing views. (A. 11.)

Starr responded to the fairness complaint on September 27, 1974. (A. 60-62.) Starr argued that it had acted reasonably and suggested that in its petition, the Guild had not "specifically defined the 'issue' that is claimed to be 'controversial.'" (A. 60.) Starr went on to explain that

... the announcements simply took note of WNCN's change of format and requested that listeners fond of the classical music format pledge money to sustain the format on a non-commercial station. The merits of WNCN's change of format was [sic] not even mentioned, let alone argued during the broadcasts.

(A. 61.) Included with Starr's response were copies of the prepared announcements, generally referred to as "continuity." (A. 63-72.)

In its reply of September 30, 1974, the Guild charged that Starr was acting "in bad faith." (A. 73.) The Guild disagreed with Starr's view that it had not discussed one side of the format change issue (A. 81), but did not specifically show the nexus between the issue of whether the format should be changed and the announcements urging particular action after it had been changed.

The Guild attacked Starr's candor, charging that Starr had "apparently concealed" announcements. (A. 84.) This conclusion was reached by the Guild on the basis that the continuity (or scripts) for prepared announcements which had been provided by Starr, did not include some announcements made by staff announcers on the air and taped by the Guild. (A. 83-84.)

The Guild argued (A. 84-85) that the announcements broadcast by WNCN were "so obviously and substantially related" to the ultimate issue (the format change) as to amount to advocacy of a position on that question, and that Starr could not be reasonable or in good faith in denying that its announcements addressed the issue of whether the format should be changed. If WNCN had not aired one side of the format change issue, the Guild argued that Starr had violated its affirmative obligation to present programming on important public issues.

(A. 86.)

On October 3, 1974 Starr supplemented its filing with continuity from WNCN's news broadcasts which explained the nature of the controversy between Starr and the Guild and informed its listeners of the status of the Guild's petition before the Commission. (A. 108-111.) In its news broadcast, WNCN also carefully identified its challengers and stated:

In the event that listeners wish to support the position of the WNCN Listeners Guild or, Classical Radio for Connecticut, the addresses of these two organizations are 633 5th Avenue, New York, New York 10022 for the Guild and 944 Washington Building, Washington, D.C. for Classical Radio.

(A. 111.) 1/

2. The Staff Ruling

Also on October 3, the Commission's Broadcast Bureau staff ruled that no Commission action was warranted on the complaint. (A. 115.) The Bureau reminded the Guild that under the fairness doctrine it is "the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue." (A. 113.) Commission review of fairness complaints is limited to determining whether the licensee acted reasonably and in good faith. (A. 113.) Most importantly, the Bureau pointed out that the complainant

1/ News copy for earlier broadcasts discussing the controversy were forwarded on October 10, 1974. (A. 122-125.)

has the burden of showing that a licensee has acted unreasonably or in bad faith. (A. 114.)

In determining whether Starr had acted reasonably and in good faith the Bureau said:

... [A]fter reading the transcripts submitted by both you and WNCN-FM we cannot say that WNCN-FM was unreasonable in determining that the announcements in question did not present one side of a controversial issue because the announcements "simply took note of WNCN's change of format" and did not argue the merits of the change.

(A. 114.) It was noted that discussion of a non-controversial issue does not become a presentation on a controversial issue of public importance if it incidentally touches on a subject which may be controversial.

Concerning Starr's affirmative obligation to cover issues of public importance, the Bureau recited the Commission's policy that the licensee, not the Commission, should select what public issues should be discussed, and that not every issue need be covered. (A. 114-115.)

3. Application for Review

a. The Guild applied for Commission review of the Bureau's ruling on November 4, 1974. (A. 144.) It characterized the Bureau's decision as deficient because it did not address the question of whether a different standard for reviewing fairness complaints should be employed when the licensee has a personal or financial interest in the issue.

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(A. 147.) The Guild also complained the Bureau had not discussed the facts, that the prepared scripts provided by WNCN did not include some announcements taped by the Guild (A. 149-150) and that some of the announcements were logged as editorials. (A. 150-151.)

b. Starr's Opposition to the Guild's Application for Review argued that:

... [T]he Guild appears also to have lost sight of the narrow legal questions presented herein: (1) whether WNCN's format change constituted a controversial issue of public importance; and (2) if so, whether the staff's ruling that WNCN acted reasonably and in good faith in determining that the announcements in question did not raise one side of a controversial issue was proper.

(A. 230.) Starr also noted that without discussing the merits of whether it had the right to change its format, "that is not the issue involved herein, nor is this the forum in which to argue same." (A. 230.)

Starr asked the Commission to hold that the format change is not a controversial issue of public importance as defined by past Commission rulings. Starr noted (A. 232-234) that a story does not become such an issue merely by being newsworthy, Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972), and that such issues are critical and significant issues of public importance to major segments of the community -- issues which will have a substantial impact on the community at large. 2/

2/ It should be noted that WNCN's listeners are drawn from a metropolitan area of over 16 million people.

Fairness Report, 48 FCC 2d 1, 12 (1974). Starr contended that in light of such criteria its determination that the format change issue was not a controversial issue of public importance was a reasonable one. Because of the wide discretion given to licensees under the fairness doctrine, the Commission is bound to defer to Starr's reasonable judgment. (A. 234-235.)

Starr argued that the staff ruling correctly found reasonable its determination that the announcements did not address the merits of the decision to change WNCN's format. (A. 235-237.) Starr also contended that through news and announcements about the Guild's activities and its litigation against Starr (A. 237-238), it had presented more than a reasonable opportunity for the views of the Guild on the merits of the format change to be heard. (See also A. 241, n. 10; A. 253-254.)

Concerning the Guild's charge that Starr had concealed announcements, Starr noted that it had provided scripts of 11 prerecorded announcements. The majority of the transcripts of the 18 announcements submitted by the Guild were of "ad lib (as opposed to taped) announcements" made by WNCN announcers, and no scripts are available for ad lib announcements. (A. 244-246.) The Opposition was accompanied by affidavits and exhibits directly supporting statements made in the Opposition. (A. 250-276.)

c. In its reply, the Guild argued that the Commission had established a different standard for reviewing fairness

complaints against an interested licensee: "that a licensee has a particular duty to assure fairness doctrine compliance when it presents views on a controversial issue in which it has a direct, personal financial interest." (A. 279, 281-288.) It argued that format changes generate controversy and that, therefore, a format change issue is a controversial issue of public importance. (A. 289.) The Guild again suggested that labelling the announcements as editorials meant that WNCN knew that its announcements addressed the merits of format change issue rather than merely attempting to raise funds. (A. 291-293.)

The Guild further contended that the many announcements concerning raising funds were not balanced by news and announcements concerning the merits of the format change controversy. (A. 294-296.)

4. The Commission's Decision

After reviewing all of the pleadings (A. 405-409), the Commission upheld the Bureau's ruling. It rejected the Guild's argument that a different standard should be applied to review of fairness complaints where the licensee has a personal or financial interest, noting that the fairness doctrine does not impose a "double standard" of licensee reasonableness. (A. 409.) In addressing the Guild's point, the Commission specifically explained that Springfield Broadcasting Corp., 45 FCC 2083 (1965), did not require a more

difficult showing of reasonableness to be made concerning an issue in which the licensee might have a financial interest.

(A. 410.) Springfield and the other cases cited stand for the proposition that after a licensee makes its judgment that it has presented programming on a controversial issue of public importance in which it is personally involved, the licensee has a particular duty to insure that contrasting viewpoints are presented. (A. 410.) The burden of showing that the licensee's action was influenced by its own financial interest is upon the complainant.

... [T]he bare statement by a complainant that a licensee is or may be personally interested in some issue does not shift the burden of proof to the licensee to show that its decisions with regard to that issue were "more" reasonable.

(A. 411.)

In upholding the Bureau's decision, the Commission stated that it was unnecessary to rule on whether the format change amounted to a controversial issue of public importance.

(A. 411.) The Commission also said that the Guild incorrectly assumed that any presentation labeled an editorial is, ipso facto, a presentation on a controversial issue of public importance.

... [T]he fact that the "save WNCN" announcements may have been logged as "editorials" is irrelevant to a decision as to whether Starr was unreasonable in determining that the "save WNCN" announcements did not address the issue of the format change.

(A. 411.) With regard to the Guild's complaint that the Bureau had quoted only one announcement in its decision, the Commission

noted that that announcement was one submitted by the Guild and that the Bureau's ruling specifically stated that it had considered the transcripts submitted by all parties. (A. 412.)

The Commission rejected the contention that the "Save WNCN" announcements implicitly addressed the format change issue. Citing the Fairness Report, 48 FCC 2d 1 (1974), the Commission said that in order to come within the language of the Report, the major views expressed over the air must closely parallel the major arguments advanced by partisans on one side or another, 48 FCC 2d at 13 . The Commission reviewed materials submitted by the Guild which revealed that

the "major arguments advanced by partisans on one side or the other of the public debate" on the WNCN format change concern the "economic viability" of the classical music format on a commercial radio station and possible misrepresentation on Starr's part in representing to the Commission in its 1972 Application for Transfer of Control of WNCN that it would continue the twenty-four-hour-per-day classical music format. Nowhere in any of the material submitted by the Guild is it indicated that the "Save WNCN" campaign or any of the statements made in the "Save WNCN" announcements were among the "major arguments" on either side of the format change controversy.

(A. 413-414.) The Commission noted that the Guild has failed to carry its burden of proof by submitting specific information to show how the announcements broadcast presented views on whether WNCN should change its format in such an obvious and meaningful fashion that the Commission must find Starr's determination unreasonable. (A. 414.)

ARGUMENT

- I. THE COMMISSION PROPERLY CONCLUDED THAT STARR WAS REASONABLE IN ITS DETERMINATION THAT THE "SAVE WNCN" ANNOUNCEMENTS DID NOT PRESENT ONE SIDE OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

- A. Starr Reasonably Concluded That its "Save WNCN" Campaign Did Not Address the Merits of Whether WNCN's Format Should be Changed.

In its pleadings, Starr contended that the "Save WNCN" announcements merely took note of the impending format change and did not argue the merits of that change. Announcements urging listeners to pledge money to support continued classical music programming did not advocate a position on the dispute over whether WNCN should change its format. Affidavits by both station managers at WNCN during the time prior to the change in format stated that it was the station's firm policy not to permit announcers to address the merits of the format change. (A. 253, 261-262.) The transcripts submitted by both Starr (A. 265-275) and the Guild ^{3/} support the statements made in the affidavits. They show clearly that no direct discussion of the merits of whether the format should be changed occurred in the "Save WNCN" announcements. The Guild does not dispute the lack of direct comment on the format change issue.

^{3/} The Guild has omitted these transcripts from the Petitioner's Appendix. Transcripts were provided to the Commission as Exhibit K of the Guild's original complaint (see A. 11). Those transcripts provided by the Guild which were included in the Commission's decision are found at A. 415-417. Exhibit K is included as an addendum to this brief.

The Guild, however, invokes (Br. 29) the language of the Fairness Report, 48 FCC 2d 1, 12 (1974), that

a broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue.

What the Guild has failed to consider is the test announced in the paragraph in the Fairness Report which follows the language upon which the Guild relies. There the Commission stated:

... [W]e would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue The licensee's inquiry should focus not on whether the statement bears some tangential relevance to the ... question, but rather on whether the statement, in the context of the ongoing community debate, is so obviously and substantially related to the [ultimate] issue as to amount to advocacy of a position on that question. If ... the arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue

48 FCC 2d at 13 (emphasis added).

The Commission examined the pleadings and supporting exhibits on the merits of whether WNCN's format should be changed filed by both the Guild and Starr with the Commission and the District of Columbia Circuit. (A. 413.) An examination of the complete record 4/ clearly supports the Commission's finding

4/ The Guild omitted from Petitioners Appendix material relating to the major arguments on the merits as irrelevant to the fairness doctrine question. The Commission will request that the Guild supplement the Appendix to include items noted in footnotes 5 and 6, infra.

that the major arguments on the format change concerned (1) the commercial viability of a classical music format, and (2) possible misrepresentation by Starr to the Commission when it purchased WNCN. 5/ After the two major arguments, the contention given the most attention appears to be the Guild's assertion that WNCN's format was unique. 6/ No other issue approached significance, let alone the position of "major argument." 7/ Moreover, the uniqueness and viability of the format are the two primary questions which must be addressed according to the Guild's reading of Citizens Committee to Save WEFM v. FCC, 506 F.2d

5/ Economic viability was discussed in the following materials: Guild Petition for revocation of license of WNCN-FM, September 23, 1974, pp. 31-38, Exh. E, J3, J4, J10, J12, J14; Starr's Opposition, September 27, 1974, pp. 4-14, 14-18, 22-24, Exh. 2, 3, 3A, 4, 5, 6, 9; Guild Reply, October 21, 1974, pp. 3, 9-21, Exh. F, G, G-1, H, I, J, K, L; Guild Memorandum in Support of Motion for Stay (D.C. Circuit, Nos. 74-1925 & 74-1926), October 10, 1974, pp. 6, 16-26. The misrepresentation allegation was debated in the Guild Petition, pp. 39-40, 45-48, Exh. O, P, Q, R; Starr's Opposition 2-4, 14; Guild Reply, pp. 3, 21-24; Guild Motion for Stay (D.C. Circuit, Nos. 74-1925 & 74-1926), pp. 8-9, 25-26; Guild Memorandum in Support of Motion for Stay (D.C. Circuit, Nos. 74-1925 & 74-1926), pp. 6, 27-28.

6/ See Guild Petition to the Commission of Sept. 23, 1974, pp. 25-30 and Exh. J1, J2, J6, J7, J8, J9, and L; Starr's Opposition of Sept. 27, 1974, pp. 20-22; Guild's Reply of October 21, 1974, pp. 2, 4-6; Guild Memorandum in Support of Motion for Stay (D.C. Circuit, Nos. 74-1925 & 74-1926) of October 10, 1974, pp. 5, 8-15.

7/ The Guild complains (Br. 38, n. 54) that the Commission ignored its unsupported claim that the "Save WNCN" campaign was intended to divert listener protest. The essence of the fairness test is that of the major arguments advanced by partisans. This particular claim was hardly a major argument; rather, it was one "of many grounds advanced by the Guild" (Br. 38, n. 54) in blunderbuss fashion. The claim is advanced in the Guild's Petition of September 23, 1974, pp. 53-56, purely as argument and without any evidentiary support.

246 (D.C. Cir. 1974). See Motion for Stay (D.C. Cir., Nos. 74-1925 & 74-1926), October 10, 1974, at 2-3. (Pp. 37-38 of Addendum to Commission's Motion to Transfer, filed July 24, 1975 in this case.)

Both the Bureau and the Commission reviewed the transcripts provided by the Guild and WNCN (A. 114; 412-413) 8/ and were unable to conclude that Starr was unreasonable in its determination that the announcements in question did not "closely parallel the major arguments" on the merits of the format change (A. 412-414).

8/ The Guild's statement that "the Bureau mentioned none of the Guild's transcriptions in its opinion" (Br. 52) is simply untrue. (A. 114; 412-413.)

B. The Commission Applied the Proper Standard in Reviewing Starr's Determination Concerning Whether the Announcements in Question Discussed the Merits of the Format Change.

After its review of the submissions by all parties in this case, the Commission held that Starr's determination was not unreasonable or in bad faith. (A. 411.) The Commission may not substitute its judgment for that of the licensee but must find a violation of the fairness doctrine "only where it determines that the licensee's actions and decision have been unreasonable or in bad faith." Straus Communications, Inc. v. FCC, No. 75-1084, D.C. Circuit, January 16, 1976, slip op. at 14. See also Neckritz v. FCC, 502 F.2d 411, 418 (1974); Democratic National Committee v. FCC, 460 F.2d 891, 903, cert. denied, 409 U.S. 843 (1972); Green v. FCC, 447 F.2d 323, 329-330 (1971). The Commission's standard of review allows considerable discretion to the licensee and does not vary depending upon the particular case being reviewed. The Commission has adequate means to deal with licensees who use their facilities for private financial gain while ignoring the public interest, and who in other ways abuse their public trust. The fairness doctrine is not the proper vehicle for such enforcement nor is it the most effective. Such overbroad use of the doctrine would undermine its effective use where it is most needed.

The Guild charges that because of Starr's position on the format change it could not have made its determination in good faith. The burden was on the Guild to make a specific

showing that Starr's personal self-interest did in fact influence Starr in its fairness doctrine. Gary Lane, 38 FCC 2d 45 (1972). The Guild, however, chose to allege bad faith in conclusory fashion, imputing to Starr sinister motives for every action taken by the station. 9/ The Commission correctly held that

... the bare statement by a complainant that a licensee is or may be personally interested in some issue does not shift the burden of proof to the licensee to show that its decisions with regard to that issue were "more" reasonable.

(A. 411.)

Moreover, the Guild argues that what is reasonable may be made unreasonable by the mere existence of a financial self-interest. The Guild recites (Br. 44-48) the same arguments made before and rejected by the Commission. The Guild argues that several cases 10/ involving the question of what

9/ For example, when Starr provided the Commission with continuity for its prerecorded announcements, the Guild attacked Starr charging that Starr was hiding additional scripts. The Guild had taped additional ad lib announcements which it said should have been provided by Starr. Ad lib announcements, however, are spontaneous and have no script. Only if WNCN had taped everything it broadcast would it have had a recording of those announcements. Such taping is not required by the Commission (A. 412) nor is it always practical for broadcasters to do so. Only the Guild monitored the station, so only the Guild had transcripts of ad lib announcements. Yet the Guild continues to allege, without any evidence in support, that Starr has suppressed material information. (Br. 51-53.)

10/ WSOC Broadcasting Co., 40 FCC 468 (1958); Springfield Television Broadcasting Corp., 45 FCC 2083 (1965) and 29 FCC 2d 339 (1971); and Pennsylvania Community Antenna Association, Inc., 6 R.R. 2d 112 (1965). In those cases the licensees did not dispute that they had presented one side of a controversial issue of public importance.

constitutes a "reasonable opportunity" for contrasting viewpoints (see Fairness Report, at 13) create a special test to be applied when determining what issue has been discussed. In its decision the Commission specifically addressed and distinguished those cases from this case. Those cases merely require that once it is determined that a licensee did program on a particular controversial issue of public importance in which it has a personal financial interest, it has a particular duty to see that contrasting viewpoints are ~~said~~ aired. Here, however, the central issue is whether such programming has in fact occurred, and the Commission upheld the Bureau's finding that Starr reasonably determined that such programming had not occurred. The Commission declined to extend the holdings of those cases beyond their facts and applied the policy announced in Public Communications, Inc., 50 FCC 2d 395 (1974). 11/ In doing so the Commission acted reasonably and within its authority, recognizing (A. 409-411) that licensee reasonableness and good faith are not quantitative standards susceptible to measurement or classification.

11/ In that case the Commission said that the burden of showing bad faith must be met by the complainant by showing that the licensee's financial interest "did in fact influence the licensee" in its decision. 50 FCC 2d at 401.

II. THE COMMISSION PROPERLY DECLINED TO MAKE AN UNNECESSARY RULING ON WHETHER THE MERITS OF WHETHER WNCN'S FORMAT SHOULD BE CHANGED CONSTITUTED A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

Having determined that the "Save WNCN" announcements did not address the merits of whether WNCN's format should be changed, the Commission had neither a duty nor a need to consider whether the merits of the format change constituted a controversial issue of public importance. Such a determination was no longer material to the disposition of the Guild's complaint and it is well accepted practice that adjudicative decisions decide only those questions which are necessary to the result.

The suggestion that WNCN failed in its affirmative obligation to devote a reasonable amount of broadcast time to the coverage of public issues, Report on Editorializing, 13 FCC 1246, 1249 (1949), Fairness Report, 48 FCC 2d 1, 9 (1974), fails to withstand analysis.

The affirmative obligation is a general one and the Commission has always held that the licensee must determine what issues are of sufficient importance to be covered and how much coverage is reasonable for those issues. Fairness Report, supra at 9-10. Moreover, the thrust of the obligation concerns "vital issues" (Br. 57) on the "local, state, national [and] international" levels, Fairness Report, supra at 10, and the Commission does not "expect a broadcaster to cover each and

every important issue which may arise in his community." Fairness Report, supra at 10. Thus, the Commission acted reasonably and consistently in upholding the Bureau's determination (A. 114-115) that Starr had not violated its affirmative obligation.

It should be noted that whether or not the merits of whether WNCN's format should be changed amounted to a controversial issue of public importance, WNCN did present news coverage and announcements concerning the merits of the format change (A. 108-111, 122-129, 254-255, 258-259). It would stretch the definition of reasonableness beyond the breaking point to state that this coverage was not sufficiently balanced to meet the requirements of the fairness doctrine.

III. THE GUILD HAS NOT SHOWN THAT MEANINGFUL RELIEF CONCERNING ITS FAIRNESS COMPLAINT STILL MAY BE GRANTED IN THIS CASE

In its request that the Commission stay WNCN's proposed format change the Guild argued, "With regard to the Fairness Doctrine Complaint ... a change of format prior to a balanced presentation of contrasting viewpoints ... would render meaningless any later remedy." (A. 52.) The format changed on November 7, 1974. During the pendency of proceedings in the District of Columbia Circuit (WNCN Listeners' Guild v. FCC, Nos. 74-1925 & 74-1926), Starr agreed to sell the station to GAF Corporation (GAF), which agreed to restore the classical format. Starr returned to the classical format pending Commission approval of the sale. (Br. 7.) It would appear that the agreement reached August 19, 1975, among all parties to effect the transfer of WQIV to GAF will ensure that the station will continue to broadcast classical music in the future. (Br. 7.)

The Guild has not indicated, in view of the present circumstances, what it hopes to gain by airing rebuttals to the "Save WNCN" announcements broadcast in 1974. The Guild notes (Br. 7) that the agreement to withdraw excluded this petition for review. However, that fact in no way creates a meaningful remedy under the fairness doctrine. The Guild has an obligation to demonstrate that a decision by this Court in its favor would result in meaningful relief and that subsequent events have not mooted this controversy. That the Guild has not done.

NO 12 - 22 -
IV. THE COMMISSION'S DECISION IS REASONABLE AND IS SUPPORTED BY THE RECORD

The Commission reasonably and properly applied its announced policies and prior decisions 12/ to the facts of this case. It took a "hard look," WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir., 1969), at the record before it and gave reasoned consideration to the pertinent factors, resulting in an order supported by substantial evidence. Mobil Oil Co. v. FPC, 417 U.S. 283 (1974). While it is clear that the Guild does not like the Commission's decision, it has in no way shown it to be unreasonable or without substantial support in the record.

Courts are called upon to exercise restraint in reviewing agency actions due to the entrusting by Congress of industry regulation "to the informed judgment of the Commission, and not to the preferences of reviewing courts." Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). Thus where the agency has "genuinely engaged in reasoned decision-making ... the court exercises restraint and affirms the agency's actions even though the court would on its own account have made different findings or adopted different standards."

Greater Boston TV Corp. v. FCC, 444 F.2d 841, 851, cert. denied, 403 U.S. 923 (1971).

12/ "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). That view is especially applicable to construction by the agency of its own rules and decisions. Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945).

CONCLUSION

For the reasons set forth above, this Petition for Review should be denied and the Commission's decision affirmed.

Respectfully submitted,

ASHTON R. HARDY,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

STEPHEN A. SHARP,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

February 23, 1976

ADDENDUM

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY DAVID DUBAL
ON SEPTEMBER 5, 1974, AT OR ABOUT 9:50 P.M.
TRANSCRIPTION NO. 1

Dubal:

. . . your calls in the Save the WCNC campaign. We would appreciate any and all pledges to help make WNCN a continuing force in New York music, to maintain it as a fulltime classical music station in New York City and that can only be done if it becomes a listener-supported, non-commercial station because this frequency is being taken October 5th by another format, a different kind of music. If you like classical music, if you like WNCN, and you feel it's worth it to you, to support it by financial contribution, no matter what size, no matter how large or how small, then call right now and make your pledge to our campaign. The phone numbers in New York City are 989-6262, 989-6188 and 989-5443. If you call any one of those and there will be a volunteer operator standing by to take your call. If you can't get through to them, call us here at 867-6171, that's at the station, we have volunteer operators here too, very good people, taking an awful lot of their time to take your money. Oh, I didn't mean that. I really did, they are wanting to take your pledges, not money right now. Certainly we're not asking for any money at this point. We've got to see how broad the base of support is for WNCN. If there is enough support to justify, the station will continue. If not, it won't; it's as simple as that, as of October 5th. In New York City, the numbers again --- you might write them down if you can't get through -- 989-6262, 989-6188 and 989-5443.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY WILLIAM
BUCKLEY JR. ON SEPTEMBER 6, 1974, AT OR ABOUT 12:04 P.M.
TRANSCRIPTION NO. 2

Buckley:

. . . If you continue to send in your pledges at the current rate we'll be over the top by the fifteenth of September, and the result will be a continuation of the music in the unique blend that you become accustomed to, with this difference, the new WNCN will not carry commercial advertising. The music director David Dubal has said that if the drive succeeds the new WNCN will be the finest music station in the world. My own opinion is that it's that already. Please make out your pledge now; write Save WNCN, 2 West 45th Street, New York Zip Code 10036. Thank you.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY ELISE TOPAZ
ON SEPTEMBER 6, 1974 AT OR ABOUT 6 P.M.
TRANSCRIPTION NO. 3

Elise Topaz:

Save WNCN. The day of WNCN's format change is getting closer and the thought of being without WNCN is becoming more and more grave. We've been asking for pledges so that a non-commercial station that broadcasts classical music could be formed. We are delighted by the response to our plea. We've received an avalanche of mail, the phone pledges have been coming in fast and furiously. We are happy to say that the average pledge has been around \$25, but we've gotten more and less. We are thankful for anything. We're doing fantastically well but our goals have not been reached. Volunteers, who by the way have been terrific, are standing by now ready to take your pledge. So call right now -- the number is 242-2200. Their number again 242-2200. Please help save WNCN. Thank you.

Unknown Announcer:

. . . notice that's a new number. There's only one number tonight, so there should be a lot less confusion, 242-2200. 242-twenty-two hundred. O.K. That's the pledge number to save WNCN and you can call it now. There are many volunteer operators on the multiple lines of that number. This is your stereo concert hall in New York, WNCN at 104.3 FM.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY DAVID DUBAL
ON SEPTEMBER 6, 1974, AT OR ABOUT 6:35 P.M.
TRANSCRIPTION NO. 4

Dubal:

. . . WNCN. The campaign launched to save our unique classical format is going extremely well. However, we need pledges from one and all. Our many fine volunteers are standing by waiting for your pledge. We need to go over the top soon. Speed is of the essence. This must be our big weekend. The number to call is 242-2200. Thank you.

Unknown Announcer:

. . . that's area code 212, of course, 212-242-2200, and there are volunteers standing by right now to take your pledge. We'll be passing along a little later in the evening an indication of where we stand financially and where we need to be. We here, we have to stand before it's all over, and to give you a little more of an inside view of what's going on. We're doing very, very, very well and if things continue to go at the wonderful rate that they have so far hopefully this weekend we'll see all we need to continue WNCN and that's an amazing thing to collect the amount of money we've needed in that amount of time. Great support. Keep it coming. We need your pledges now if you haven't made them. Area code 212-242-2200.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY DAVID DUBAL
ON SEPTEMBER 6, 1974, AT OR ABOUT 8:05 P.M.
TRANSCRIPTION NO. 5

Dubal: (Same as transcription No. 4.)

Unknown Announcer:

That's area code 212 of course, New York. There is also a need for volunteers since this is a long weekend and we will need volunteers to answer these pledge phones throughout the weekend as we try to go over the top. That number if you would like to volunteer your service as a phone answerer or tally taker or whatever they need you for, the number to call is 242-2298. That also is area code 212. They're accepting pledges right now, the volunteers who are on duty at 242-2200. Call your pledge in now. It's time for a broad report of late news and weather . . . [News and weather and commercials]

. . . Call in your pledge. Here's the number, Area code 212-242-2200. That's 242-2200, that's the pledge number. Our volunteer operators are standing by waiting for you call right now. They'll take your pledge whatever it is. It doesn't matter how big or how small. If you have a lot of money you'd like to pledge, that's fine but if you have \$5 that's fine too. A dollar, whatever you can afford to pledge to help save WNCN. We appreciate it if we can get more, better, but the minimum amount to save WNCN is 500,000. O.K. Now you have the facts. Make your pledge. 242-2200. Twenty-five minutes past eight o'clock, we continue with the songs of Poulenc as performed by the soprano Maxime Menkus, Anthony Menkus at the piano.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY ELISE TOPAZ
ON SEPTEMBER 6, 1974, AT OR ABOUT 9:04 P.M.
TRANSCRIPTION NO. 6

Elise Topaz: (Same as Transcription No. 3.)

Unknown Announcer:

The volunteers are on duty right now to take your calls. We do need more volunteers over the weekend, because this is going to be a 24-hour thing. . . for the weekend at least. Hopefully, we can go over the top. By last report, we had 260,000 dollars, going for 500,000. However, there is a \$100,000 matching grant will put us very near the minimum goal that we've set to save WNCN. We do need volunteers to answer phones and letters and things over the weekend. If you'd like to volunteer the number is area code 212-242-2298. O.K. The pledge number, which is the single most important one at this moment, is 242-2200, and you can call in your pledge right now.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY WILLIAM
BUCKLEY, JR. ON SEPTEMBER 6, 1974 AT OR ABOUT 9:55 P.M.
TRANSCRIPT NO. 7

Buckley:

... of Starr Broadcasting. As you know, \$100,000 has been pledged by a foundation provided we can match it with fresh pledges. We are beginning negotiations to keep WNCN alive, 24 hours of the music you have become used to, only this time without commercial interruptions of any kind. So please remember, your pledge has double value for the next \$100,000. Please write to Save WNCN, 2 West 45th St., New York 10036, or telephone 242-2200. There are ten volunteers standing by to take your call. Thanks.

Unknown Announcer:

The number again is 242-2200. That's area code 212, of course. Make your pledge now, because it's worth double because of the matching grant, matching funds from the foundation, \$100,000 worth, of course.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY WILLIAM
BUCKLEY JR., ON SEPTEMBER 6, 1974 AT OR ABOUT 10:57 P.M.
TRANSCRIPTION NO. 8

Buckley:

. . . Buckley Jr., Chairman of the Board of Starr Broadcasting. Your initial response to the drive to save WNCN has made us all hugely optimistic, that New York's finest fine-music station will continue to serve the community. The good news right now is that a foundation has offered to match up to \$100,000 any pledge received from today until the end of the drive. With this grant and another \$100,000 from you we'll have made it. We promise to keep you posted. Meanwhile, please send in your pledge. Tell how much you are willing to give annually -- yes, it will be tax-deductable -- to keep WNCN alive. Send your pledge to Save WNCN, 2 West 45th Street, New York 10036. Thank you.

Webb:

Just a reminder that that pledge number again is 242-2200, that's area code 212. The last report we had about 280,000 dollars, so in the course of this evening, we've collected close to \$30,000. Not bad. Keep it coming, because we're working with a \$100,000 matching grant from a foundation. Every dollar we collect they'll match it up to \$100,000, so your pledge is worth double right now. The operators will be on duty, apparently at least some of them throughout the night, as Mr. Watson comes on in just a few minutes. The number is 242-2200. I thank you for your company, since I've been here. My name is Rob Webb and, believe it or not, I'll see you in the morning.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY DAVID DUBAL
ON SEPTEMBER 7, 1974, AT OR ABOUT 10:05 P.M.

TRANSCRIPTION NO. 9

Dubal: (Same as Transcription No. 4.)

All right, the number is open right now. It's area code 212, of course, and you can call right now. A volunteer will take your pledge, any amount, it doesn't matter. We're working on a \$100,000 matching grant this weekend, toward which we already have \$60,000. For every dollar we collect, up to \$100,000, over this weekend, starting yesterday, the foundation has offered to match, dollar for dollar, up to 100,000 and we've got 60,000 of it already. You can add to it. Your pledge is worth double, in effect, over this weekend. Not a bad deal.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER, ON SEPTEMBER 8, 1974, AT OR ABOUT 3:52 P.M.
TRANSCRIPTION NO. 10

Announcer:

To date, on our telephone campaign, pledge that you have been so generous in your calls, and we hope that many more of you respond, we have . . . 34,000 dollars has been pledged so far in this effort to keep WNCN alive and well. We hope that these pledges will continue to come throughout the early evening and late night hours.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY ELISE TOPAZ
BETWEEN SEPT. 8 AND 13, 1974.

TRANSCRIPTION NO. 11

Topaz:

. . . available only on WNCN. Think about that. There is no other station in the United States that offers the depth of programming that WNCN brings you every day, 24 hours a day. In the last week, over 300 people have worked to collect 16,000 pledges to preserve fine music in New York City. That's 16,000 out of an audience of about 400,000. If you are listening to this announcement, and you haven't called in your pledge, all we can say is we need your help. There are no more sponsors to pay our way. From now on, it's just you, and us, and the music. Please call now: (212) 242-2200, or write: Save WNCN, 2 W. 45th St., New York 10036. The phone number again is 242-2200. Thank you.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER BETWEEN SEPT. 8 AND 13, 1974. TRANS-
CRIPTION NO. 12.

Announcer:

I know it's a lovely afternoon out, but our volunteers are standing by right now to receive your pledge. I might mention the average pledge has been \$25. And the number to call: (212) 242-2200. Ralph Lowenstein is there, and the Music Director, David Dubal, of WNCN is also waiting to hear your phone call. Another very important (unintelligible) is needed to keep this program going for your listening pleasure. We have received so far over \$400,000. And remember, volunteers are needed for tomorrow. Please, the phone number to call for your time -- and we do need it desperately -- (212) 242-2297.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER BETWEEN SEPT. 8 AND 13, 1974. TRANSCRIPTION
NO. 13.

Announcer:

. . . as of October 5th, and (unintelligible) send rock music out on the air. This can only be provided by you, the listeners. What we're asking for is pledges. WNCN is attempting to create a non-commercial station -- a station without commercials ... to subsidize it. Therefore we do need your help. We want to continue playing the music of Tschaikovsky and Beethoven, the long selections, the operas that you have enjoyed through the years, but we can not do it without your help. We are please asking you to pledge to continue and save WNCN. The telephone number to call is (212) 242-2200. Operators are standing by right now. We (unintelligible) pick up the phone right now. The number, in New York, 242-2200. If you're out of town, area code (212) 242-2200. Pledge whatever you can. And also, we desperately need volunteers, especially for tomorrow morning, volunteers to help us and to answer the telephones and receive your pledges. We need you between seven a.m. tomorrow morning and midnight. Whatever time during the day that you can offer would be very much appreciated. And the phone number for volunteers (212) 242-2297.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER BETWEEN SEPT. 8 AND 13, 1974. TRANSCRIPTION
NO. 14.

Announcer:

As of October 5th you will no longer hear classical music broadcast on WNCN. If this shocks you, it is certainly meant to. There is only one way that we can possibly keep classical music coming to you, and I know that you will enjoy hearing it continue, and that is if you pledge to this station. What we're doing is setting up an independent classical music station, with the same staff now operating WNCN, with the same classical music, with one exception: there will be no interruptions like this, we hope, and there will certainly be no commercials. It will be a non-commercial station, which will enable us to bring very, very long selections to you uninterrupted, and I'm sure you will enjoy hearing that, but you must please help us, and we desperately need help. The number to call for a pledge is (212) 242-2200. I will mention that \$500,000 is the minimum that we do need for this experiment. It will work, it must work, and frankly, and very happily I will say that we have received pledges in excess of \$400,000. So there is not much more that is needed, but time is running short right now. We must raise the extra \$100,000 within the next several days, so, please, pledge, to WNCN. Keep WNCN on the air. And only you could do it. Only the listeners, no one else. The number to call is (212) 242-2200, and please call right now.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER BETWEEN SEPT. 8 AND 13, 1974. TRANSCRIPTION
NO. 15.

Announcer:

... the time has come, and the event is Save WNCN. As you no doubt know, on October 5th, WNCN will no longer broadcast classical music. The combined efforts of a great many dedicated people are being brought to bear to help WNCN find another frequency, so that it can continue to broadcast classical music, on a listener-supported basis. In order to do that, we need listener support; that's you, the classical music nut. Anything that you can pledge -- anything -- would be of great help. To do it simply go to your telephone, or your neighbor's telephone, and call (212) 242-2200. Operators are standing by right now to receive your call.

TRANSCRIPTIONS OF EDITORIAL MADE ON WNCN BY DAVID A.
DUBAL BETWEEN SEPT. 8 AND 13, 1974. TRANSCRIPTION
NO. 16.

Dubal:

This is David Dubal, WNCN's Program Director. The phones, unfortunately, are silent. Those phones must now make music, if you want us to continue to make music. Without WNCN, and may I make it clear, there may never be another institution like this, it is up to each and every one of you of our 400,000 listeners to make a pledge for the survival of this unique format. As you know, WNCN plays more classical music than any other station in the world. Without its continuance the City of New York loses one of its great cultural outlets. It has been said that music is the art that all other arts aspire to. Let us help save that art for civilization. Your pledge is needed desperately. Call Save WNCN, and the number is 242-2200. Call. Thank you.

Unknown Announcer:

To try and find what David means, of course, he means WNCN's musical concept, classical music, which we'll be moving, we hope, the entire organization, records, programming dept., staff, announcers and the rest to another number on the FM dial, which I hear we're in negotiation now. What is important, of course, is that we have the right power from that station, and of course a clear signal. That's very important. We have so far, according to Peter Kaminsky who's been running the downtown operation, \$443,000, and a few hundred to that by now, so we're about winding down our half a million dollars that we need, but right now, of course, is the time that we need it the most, because most people have said, well, \$443,000, they're so close to the \$500,000 mark, I don't think I'll bother; but please do. It is important.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY UNKNOWN
ANNOUNCER BETWEEN SEPT. 8 AND 13, 1974. TRANSCRIPTION
NO. 17.

Announcer:

Just a quick reminder that we're taking pledges at 242-2200. I say we -- volunteers are taking pledges, bless their hearts. 242-2200 is the phone number to call. The pledges are to help save WNCN. As of October 5th, the 104.3 frequency on your FM radio dial will no longer broadcast classical music. There will be a format change to what is described as "Pop" music, and there is an effort underway to try and find another frequency on the FM dial to which WNCN as we know it, classical music, the record library and the staff, would go and hopefully broadcast on a 24-hour-a-day, non-commercial, listener-supported basis. To that extent we need an indication of what type of listener support we can expect, so pledges, not money but pledges of money, are being taken at 242-2200, so call that number now to help save WNCN.

TRANSCRIPTION OF EDITORIAL MADE ON WNCN BY DAVID DUBAL
ON SEPT. 15, 1974, AT OR ABOUT 9 P.M. TRANSCRIPTION
NO. 18.

Dubal:

Within a short time the WNCN audience has proved its magnificent loyalty to our classical format we have achieved our goal of one half million dollars. May I thank all of the fine volunteers under the dedicated efforts of Elise Topaz who helped make this possible, and of course the twenty-thousand people who wrote or called in pledges. We will keep you informed as to the negotiations that will hopefully put WNCN back on the air. I thank each and every one of you.



IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WNCN LISTENERS' GUILD,)
Petitioner,)
)
v.) No. 75-4145
)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
Respondents,)
)
STARR WQIV, INC.,)
Intervenor.)

CERTIFICATE OF SERVICE

I, Joan Whittemore, hereby certify that the foregoing printed "Brief for Respondents" was served this 23rd day of February 1976 by mailing true copies thereof, to the following persons at the addresses below:

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